95 FLRR 1-1072

Internal Revenue Service, Washington, DC, and Internal Revenue Service, Kansas City Service Center, Kansas City, MO and NTEU and NTEU, Chapter 66 66

Federal Labor Relations Authority

7-CA-00658; 50 FLRA No. 86; 50 FLRA 661

July 31, 1995

Judge / Administrative Officer

Before: Segal, Chair, Armendariz and Talkin, Members

Related Index Numbers

44.34 Subjects of Bargaining, Conditions of Employment, Performance Appraisal

72.775 Employer Unfair Labor Practices, Miscellaneous Unfair Labor Practices, Refusal to Supply Information, Information Necessary and Relevant

Case Summary

THE AUTHORITY FOUND AN UNFAIR LABOR PRACTICE OCCURRED WHEN THE EMPLOYER REFUSED TO PROVIDE THE UNION WITH PERFORMANCE APPRAISAL RECORDS REQUESTED BY THE UNION UNDER 5 USC 7114(b)(4). The union requested copies of an employee's performance appraisal. The union stated the information was needed to represent another employee in the same job position in a possible grievance proceeding related to her appraisal. The agency argued the appraisal was not necessary within the meaning of 5 USC 7114(b)(4) and since the appraisal included intramanagement information, the standard adopted by the Authority in *National Park Service* [93 FLRR1-1310] for determining the necessity of such information should apply even though it did not constitute management guidance, advice, counsel or training. The standard adopted by the Authority requires parties to articulate and exchange their respective interests in disclosing information. A union requesting information under 7114(b)(4) must establish a particularized need for the information by articulating with specificity why it needs the requested information, including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the statute. The union must further establish that the requested information is required in order to adequately represent its members. The agency denying a request for information must assert and establish any countervailing anti-disclosure interests. The Authority stated an unfair labor practice will be found if a union has established a particularized need for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need. The parties should also consider alternative forms or means of disclosure that may satisfy both a union's informational needs and an agency's interests in that information. In this case, the Authority found the union had a strong pro-disclosure interest in the employee appraisal and the agency had no specific anti-disclosure interests, therefore the agency was ordered to release the information to the union.

Full Text

DECISION AND ORDER*1

I. Statement of the Case

This unfair labor practice case is before the Authority in accordance with section 2429.1(a) of the Authority's Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists.

The complaint alleges that the Respondents violated section 7116(a)(1),(5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to provide the Charging Parties with certain information requested under section 7114(b)(4) of the Statute. For the following reasons, we conclude that the Respondents violated the Statute, as alleged in the complaint. In so doing, we set forth the approach to determine whether the

requested information is necessary, within the meaning of section 7114(b)(4).

II. Stipulation

The National Treasury Employees Union (NTEU) is the exclusive representative of a nationwide bargaining unit encompassing professional and nonprofessional employees of Respondent's service centers, including the Kansas City Service Center. NTEU Chapter 66 (the Union), an agent of NTEU, represents unit employees at that service center.

During April 1989, two employees, Carol Stevens and Ida May Long, were assigned as Incentive Pay Coordinators at the Kansas City Service Center. Prior thereto, Long held the position of Group Manager, a nonunit position. Stevens was a bargaining unit member at all relevant times. As Incentive Pay Coordinators, "Long was designated as management's representative, and Stevens was designated as the employees' (or NTEU's) representative." Stip. at 3, para. 11. As Incentive Pay Coordinators, Stevens and Long have the same position description, perform the same work, are subject to the same job elements and performance standards, and report to the same supervisor. Neither employee supervises the other.

Long receives an annual evaluation for performance during an appraisal cycle of October to October. Stevens receives an annual evaluation for performance during an appraisal cycle of April to April. In October 1989, Long was appraised for 6 months' work as Group Manager and, based on the elements and standards for the Incentive Pay Coordinator position, 6 months' work as Incentive Pay Coordinator. In April 1990, Stevens was appraised, based on elements and standards for the Incentive Pay Coordinator position, for 1 year's work in that position.

Stevens was dissatisfied with her April 1990 performance appraisal and, with the assistance of the Union, filed a grievance challenging it. Subsequently, the Union requested under section 7114(b)(4) of the Statute*2 a copy of Long's 1988-89 performance appraisal. In its request for the appraisal, the Union stated its position that Stevens' appraisal constituted "reprisal for Union activities and [was] not valid or indicative of the employee's performance." Exh. 3 to Stipulation. The Union also stated that the information was "needed to represent the employee in a grievance over the rating . . . on the grievant's annual appraisal." Id. The Respondents have refused to provide the Union with the requested appraisal.*3 Stevens' grievance has been held in abeyance pending resolution of this unfair labor practice case.

The parties stipulated that the requested appraisal is normally maintained by the Respondents in the regular course of business, is reasonably available, and is not prohibited from disclosure by law.

III. Positions of the Parties*4

A. Respondents

The Respondents argue that the requested appraisal is not necessary, within the meaning of section 7114(b)(4) of the Statute. The Respondents note that, although the Union seeks the appraisal only insofar as it addresses Long's performance as an Incentive Pay Coordinator, the appraisal information regarding Long's performance in that position is "commingled" with appraisal information regarding Long's performance as a Group Manager "to such an extent that it cannot be provided in a sanitized manner and even assuming, arguendo, that it could be sanitized, the remaining data would not be in a form that could be used by any party to effectively fulfill representational duties." Respondents' Brief at 3-4. According to the Respondent:

[E]ven if the unsanitized Long appraisal is provided to the Charging Part[ies], such appraisal still does not form a basis for the desired comparison. The supporting narratives do not set forth any specific weight(s) given to the employee's performance as a manager or bargaining unit employee. Thus, even with the full explanations the Charging Part[ies] will not be able to determine what portion of the ranking is attributable to the employee's performance in each

position.

Id. at 5.

In their supplemental brief, the Respondents contend that, even though Long's appraisal does not constitute management guidance, advice, counsel, or training, the standard adopted by the Authority in National Park Service, National Capital Region, United States Park Police, 48 FLRA 1151 (1993) [93 FLRR 1-1310] (Member Talkin concurring in part and dissenting in part)(National Park Service), for determining the necessity of such intramanagement information should be applied in this case.*5 The Respondents note, in this regard, that the requested appraisal "is that of a non-bargaining unit member that includes evaluations of the individual's managerial performance." Respondents' Supplemental Brief at 5. Finally, the Respondents affirm that "[n]o Privacy Act implications have been alleged in this case." Id.*6

B. Charging Parties

The Charging Parties assert that Long's appraisal is "necessary and relevant for the Union to represent Ms. Stevens in the processing of her grievance, to evaluate whether to pursue the grievance, and, if the Union determines to arbitrate the grievance, to prepare its case before an arbitrator." Charging Parties' Brief at 5. Although the Charging Parties acknowledge that the relationship between the numerical and narrative portions of Long's appraisal "may be more difficult to discern due to the inclusion of evaluative material on [Long's] work as a Group Manager," they argue that the appraisal "will nonetheless shed light on the question of disparate treatment," and is "essential" for the Union to effectively represent Stevens. Id. at 6, 8.

C. General Counsel

The General Counsel argues that "Long's entire . . . appraisal must be released to the Union." G.C.'s Brief at 9. According to the General Counsel, the appraisal "is relevant and necessary to the continued pursuit of Stevens' grievance[.]" Id. at 8.

In the supplemental brief filed in response to the Authority's Order, the General Counsel asserts that the standard for determining the necessity of intramanagement documents set forth in National Park Service should not be applied in this case because the "basic underpinning" of that standard -- that there is always a countervailing interest against disclosure of such documents -- is not present when other types of information are requested. G.C. Supplemental Brief at 6.

IV. Analysis and Conclusions

A. Analytic Approach

The sole issue presented in this case is whether the requested appraisal is necessary, within the meaning of section 7114(b)(4) of the Statute.*7 In this regard, in National Park Service, the Authority held that, in determining whether a union has demonstrated that information involving guidance, advice, counsel, or training for management officials ("intramanagement guidance") is necessary, within the meaning of section 7114(b)(4) of the Statute, the Authority will follow the approach set forth in National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) [92 FLRR 1-8001] (NLRB v. FLRA). The case now before the Authority presents the first opportunity since National Park Service to consider its application to other types of information.

In NLRB v. FLRA and its progeny,*8 the United States Court of Appeals for the District of Columbia Circuit established the analysis it will apply to determine whether the release of information requested by a union under section 7114(b)(4) is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."*9 Under the D.C. Circuit's approach, a union requesting information under section 7114(b)(4) of the Statute is required "to demonstrate a 'particularized need' for information it seeks[.]" Allenwood Prison Camp v. FLRA, 988 F.2d at 1270. In determining whether information must be disclosed under that section, "the Authority must consider 1) the union's particularized need for the requested information sought . . . , and 2) the countervailing anti-disclosure interests of the

agency[.]" Id. The court held that the Authority is required to "weigh the particularized need . . . for the information against the agency's interest in withholding it . . . ." Id. at 1271.*10

Although initially set forth by the D.C. Circuit in a case involving intramanagement guidance, NLRB v. FLRA, that court has applied this approach to other types of documents as well. E.g., VA v. FLRA, 1 F.3d at 23 (request for minutes of certain meetings); Allenwood Prison Camp v. FLRA (request for crediting plans). The United States Court of Appeals for the Fifth Circuit has stated its agreement with the D.C. Circuit. Department of Justice v. FLRA, 991 F.2d 285, 291 n.3 (5th Cir. 1993) [93 FLRR 1-8008] (dictum) (Justice v. FLRA) (in reviewing an Authority decision requiring the disclosure of, inter alia, documents comprising the work products of certain employees, the court stated both that the Authority had erred by requiring disclosure of information that was merely relevant to a union and that it agreed with the D.C. Circuit that, under section 7114(b)(4), "the necessity standard 'implicitly recognizes countervailing interests . . . .'"). In addition, anti-disclosure interests are also considered relevant in interpreting the duty to provide information imposed on an employer by section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5). See Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 (1979) (Court rejected proposition that union interests "must always predominate over all other interests, however legitimate"). Indeed, such private-sector precedent appears to have informed the D.C. Circuit's view on information disclosure required under the Statute. See NLRB v. FLRA, 952 F.2d at 531.

In asserting that the Authority should not extend the National Park Service approach to information other than intramanagement guidance, the General Counsel and a number of amici express concern that doing so may result in undue limitations on the disclosure of information. See, e.g., General Counsel's Supplemental Brief at 6; Amicus Brief on behalf of American Federation of State, County, and Municipal Employees, Local 2830 at 4. It is clear, in this regard, that the purpose of section 7114(b)(4) is to provide unions with access to information that is necessary for them to provide effective representation to employees in their bargaining units. See, for example, American Federation of Government Employees, AFL-CIO, Local 1345 v. FLRA, 793 F.2d 1360, 1364 (D.C. Cir. 1986) [86 FLRR 1-8056] ("The Union cannot fulfill its obligation to fully represent all employees in the unit if it lacks information necessary to assess its representational responsibilities."). Moreover, we are mindful that Congress specifically found that labor organizations and collective bargaining in the Federal service are in the public interest and that the statutory protection of employees' rights to organize, bargain collectively, and participate through labor organizations in decisions that affect them: (1) safeguards the public interest; (2) contributes to the effective conduct of public business; and (3) facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment. 5 U.S.C. 7101. See also FAA, 50 FLRA at 344 ("The ability to exchange information is central to the labor-management relationship.").

However, we are not persuaded that Congress' intent regarding the exchange of information necessary for effective representation would be best served by establishing differing approaches under section 7114(b)(4)(b) based upon the type of information requested. Moreover, we find no basis in the text of section 7114(b)(4), its legislative history, or other authority for applying different analytic approaches to determine the necessity of different types of documents. Further, the courts have applied a "unitary" approach without regard to the type of documents requested. Allenwood Prison Camp v. FLRA, 988 F.2d at 1270. To do otherwise would cause confusion and thereby inevitably delay the exchange of information necessary to effective labor-management relations. In contrast, we believe that establishing a consistent approach that clarifies the burdens placed on both parties in requesting and

responding to requests for information under section 7114(b)(4) will serve to reduce confusion and expedite the exchange of information. Accordingly, to effectuate the purposes of the Statute, we will apply the same approach whether or not the information request involves intramanagement guidance.

We hold that, in determining whether and how requested information must be disclosed under section 7114(b)(4) of the Statute, we will consider both parties' interests consistent with the aforementioned judicial decisions construing section 7114(b)(4) of the Statute and private sector labor law. Specifically, a union requesting information under that section must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute.*11 The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be relevant or useful to a union.*12 Instead, a union must establish that requested information is "required in order for the union adequately to represent its members." Justice v. FLRA, 991 F.2d at 290.

The union is responsible for articulating and explaining its interests in disclosure of the information. Satisfying this burden requires more than a conclusory or bare assertion. Among other things, a request for information must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute.*13

In National Park Service, the Authority accepted the D.C. Circuit's view, NLRB v. FLRA, 952 F.2d at 532, that an agency has presumptive anti-disclosure interests in intramanagement guidance documents. National Park Service, 48 FLRA at 1160. We agree with the General Counsel that this presumption should not extend to other types of documents because we find no statutory basis for doing so. An agency denying a request for information under section 7114(b)(4) must assert and establish any countervailing anti-disclosure interests. Like a union, an agency may not satisfy its burden by making conclusory or bare assertions; its burden extends beyond simply saying "no."

We conclude that applying a standard which requires parties to articulate and exchange their respective interests in disclosing information serves several important purposes. It "facilitates and encourages the amicable settlements of disputes . . ." and, thereby, effectuates the purposes and policies of the Statute. 5 U.S.C. 7101(a)(1)(C). It also facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. In addition, it permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed.

Where parties are unable to agree on whether or to what extent requested information must be provided, an unfair labor practice will be found if a union has established a particularized need, as defined herein, for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need. We expect the parties to consider, as we will in determining whether and/or how disclosure is required, alternative forms or means of disclosure that may satisfy both a union's information needs and an agency's interests in information. Cf. Detroit Edison, 440 U.S. at 301 (Court concluded that employer's "willingness to disclose" requested information in manner other than that requested by the union "satisfied its statutory obligations."). Moreover, we emphasize that considering the agency's countervailing interests in this way is not intended to impose an insurmountable burden on a party requesting information.*14

B. Application of Analytic Approach

In this case, the Union requested Long's appraisal to assist in processing a grievance alleging

that Stevens' appraisal was issued in reprisal for her Union activity. In particular, the Union alleged that Stevens "had been treated inequitably in the evaluation of her performance." Stip. at 5, para. 19. The Union argued that a "comparison" of Stevens' and Long's appraisals was necessary for the Union to determine whether and how to pursue the grievance. Id.

As noted previously, Long and Stevens occupy the same position, and their work as Incentive Pay Coordinators is appraised based on the same elements and performance standards. Further, Long and Stevens are the only employees at the Kansas City Service Center who occupy the position of Incentive Pay Coordinator. Moreover, although Stevens was at all relevant times a unit employee who engaged in protected Union activity, Long was a nonunit employee prior to her appointment as Incentive Pay Coordinator and, following her appointment, was designated as the management representative.*15

In these circumstances, it is clear that, in connection with the processing of a grievance contesting Stevens' performance appraisal on the basis of, among other things, Stevens' Union activity, the Union has strong pro-disclosure interests in Long's appraisal. Indeed, disclosure of Long's appraisal appears vital to the Union's ability to make an informed judgment as to the merits of Stevens' grievance. In this regard, the Union already "has evidence of the actual tasks performance and output produced by the two Incentive Pay Coordinators[.]" Charging Parties' Brief at 6. However, without the ability to compare their performance ratings and the written reasons therefor, the Union will be unable to effectively evaluate whether the Respondent applied Stevens' and Long's performance standards and elements without regard to unit status.

On the other hand, here the Respondents assert no specific anti-disclosure interests. Instead, the Respondents challenge whether the document will provide a "meaningful basis of comparison" to Stevens' ratings. Respondents' Brief at 5. Having examined Long's appraisal, we are unable to conclude that the appraisal is so meaningless that it cannot be found "necessary", within the meaning of section 7114(b)(4). The clear references in the appraisal to Long's performance as an Incentive Pay Coordinator persuade us to reject the Respondents' assertion that it could not "be used by any party to effectively fulfill representational duties."*16 Id. at 4. Moreover, even assuming there is merit in the Respondents' assertion that the appraisal will not establish that Stevens was improperly appraised, it would not be determinative of whether the appraisal is necessary under section 7114(b)(4) of the Statute. Cf. National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432, 438 (1967) (in upholding NLRB order that employer provide information for union to evaluate grievances, Court stated that when the employer "furnishes the requested information, it may appear . . . that the grievances filed are without merit.").

In summary, after considering the Respondents' arguments challenging the Charging Parties' asserted pro-disclosure interests, we conclude that a particularized need has been established for the requested appraisal. The Respondents have not asserted any anti-disclosure interests in the document. Accordingly, we find that the appraisal is necessary, within the meaning of section 7114(b)(4) of the Statute. As the Respondents concede that all the other statutory requirements for disclosure of the requested information have been met, we conclude that the Respondents' refusal to furnish the Charging Parties with the information constitutes a failure to comply with section 7114(b)(4) and, thereby, a violation of section 7116(a)(1), (5), and (8) of the Statute. To remedy the unfair labor practice, we direct the Respondents to cease their unlawful action and to furnish the Charging Parties with the requested information.

V. Order

Pursuant to section 2423.29 of the Authority's Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas

City, Missouri, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Treasury Employees Union, the exclusive representative of certain of its employees, and the National Treasury Employees Union, Chapter 66, a copy of the 1988-89 performance appraisal of Ida May Long.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Furnish the National Treasury Employees Union and the National Treasury Employees Union, Chapter 66, a copy of the 1988-89 performance appraisal of Ida May Long.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Internal Revenue Service, Kansas City Service Center and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to their respective employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the National Treasury Employees Union, the exclusive representative of certain of our employees, and the National Treasury Employees Union, Chapter 66, a copy of the 1988-89 performance appraisal of Ida May Long.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Statute.

WE WILL furnish the National Treasury Employees Union and the National Treasury Employees Union, Chapter 66, a copy of the 1988-89 performance appraisal of Ida May Long.

_____

(Activity)

Dated:_____

By:_____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204 and whose telephone number is: (303) 844-5224.

Concurring Opinion of Member Talkin

I write separately only to reiterate my view, as stated in my separate opinion in National Park Service, that a determination of necessity under section 7114(b)(4) need not take into account an agency's countervailing interests against disclosure. Nor would I presume the existence of countervailing interests in any case. However, as I previously acknowledged, countervailing interests, particularly those involving the confidentiality of information,

may be considered in determining the form and extent of disclosure. Because the approach here acknowledges that an agency has a burden to establish its countervailing interests and because it encourages parties to accommodate their respective interests, I concur in the approach and its application in this case.

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1. Member Talkin's concurring opinion is set forth at the end of this decision.

2. Section 7114(b)(4) of the Statute provides that the obligation to bargain in good faith includes the obligation: in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

3. A copy of Long's appraisal was attached to the parties' stipulation. The parties agreed that the appraisal would not be disclosed to the Charging Parties during these proceedings.

4. In addition to the briefs filed with the stipulation, the Respondents and the General Counsel filed supplemental submissions in response to an Authority Order requesting additional information and argument. Interested parties also were requested to submit briefs as amicus curiae on related issues. 59 Fed. Reg. 63995 (Dec. 12, 1994). The views expressed in amicus briefs have been considered but are not individually summarized.

5. The parties' stipulation sets forth the Respondents' argument that the refusal to provide the Union with a copy of Long's appraisal did not violate the Statute because, among other things, the appraisal constitutes guidance, advice, counsel, or training provided for management officials, within the meaning of section 7114(b)(4)(C) of the Statute. Stip. at 5, para. 22. However, in their supplemental submission, the Respondents state that the requested information does not constitute such information. Accordingly, we find that the requested information is not encompassed by section 7114(b)(4)(C).

6. In its Order, the Authority posed, among others, the following question: "Is the Privacy Act relevant to determining whether the requested document must be disclosed?" In response, the Respondents confirm that the Privacy Act is not implicated in this case. Respondents' Supplemental Brief at 3.

7. We note that performance appraisal information may present Privacy Act implications. E.g., U.S. Department of Transportation, Federal Aviation Administration, New York TRACON Westbury, New York, New York, 50 FLRA 338 (1995) (FAA). However, even where the Privacy Act is implicated, it does not always operate to bar the disclosure of information. For example, it does not prevent the disclosure of information "with the prior written consent of . . . the individual to whom the [information] pertains" or which falls within one of the Act's enumerated exceptions, 5 U.S.C. 552a(b)(1)-(11). Because the Respondents do not assert any Privacy Act constraints, the issue whether disclosure of Long's appraisal is prohibited by the Privacy Act is not presented in this case and we do not address it further.

8. United States Department of Veterans Affairs, Washington, D.C. v. FLRA, 1 F.3d 19 (D.C. Cir. 1993) (VA v. FLRA); United States Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania v. FLRA, 988 F.2d 1267 (D.C. Cir. 1993) [93 FLRR 1-8007] (Allenwood Prison Camp v. FLRA); United States Department of the Air Force, Scott Air Force Base v. FLRA, 956 F.2d 1223 (D.C. Cir. 1992) [92 FLRR 1-8005] (per curiam).

9. It is well-established that the statutory reference to the "discussion, understanding and negotiation of subjects within the scope of collective bargaining" encompasses more than the process of negotiating a collective bargaining agreement. E.g., NLRB v. FLRA, 952 F.2d at 526 ("It is undisputed that the agency's duty to furnish information under section 7114(b)(4) extends to contract administration as well as contract negotiations."); Department of Housing and Urban Development, San Francisco, California, 40 FLRA 1116, 1121 (1991) [91 FLRR 1-1268] ("[T]he duty to provide information 'must be evaluated in the context of the full range of union responsibilities in both the negotiation and the administration of a labor agreement.'") (emphasis in original; citation omitted).

10. We note that the D.C. Circuit has used the phrase "particularized need" in varying contexts, causing a confusion evident in the briefs submitted to the Authority on this issue. In NLRB v. FLRA, the court introduced the phrase "particularized need" to describe the heightened level of "need" for disclosure of intramanagement guidance that a union must establish to outweigh the countervailing agency interests identified by court. 952 F.2d at 532. However, in Allenwood, the phrase "particularized need" was used to describe the showing a union must make regardless of the type of documents or countervailing interests at issue. 988 F.2d at 1270-71. Accord VA v. FLRA, 1 F.3d at 23. In adopting the NLRB v. FLRA approach in National Park Service, the Authority did not address this apparent distinction.

11. To avoid further confusion, see note 8, we use the term "particularized need" here, consistent with its use in VA v. FLRA and Allenwood Prison Camp v. FLRA, to describe the union's showing rather than a heightened level of need required for certain documents.

12. We note that, under Executive Order 11491, an agency was required to provide a union with requested information that was "necessary and relevant." E.g., Department of Justice, Immigration and Naturalization Service, 7 A/SLMR 800 (1977). The Statute does not contain a reference to relevance. See also Justice v. FLRA, 991 F.2d at 290 ("There is a significant qualitative and quantitative difference between information that is relevant and information that is necessary. Information that is only relevant may be useful, but it does not fall under the category of necessary."); NLRB v. FLRA, 952 F.2d at 531 (Section 7114(b)(4) "entitles the union to 'necessary,' not to 'relevant' information, i.e., something less than what full 'discovery' might require.").

13. However, a request need not be so specific as, for example, to require a union to reveal its strategies or compromise the identity of potential grievants who wish anonymity. See, for example, NLRB v. FLRA, 952 F.2d at 530 ("Necessarily, the bargainers are not obliged to reveal their strategies[.]"); American Federation of Government Employees, AFL-CIO v. FLRA, 811 F.2d 769, 774 (2d Cir. 1987) [87 FLRR 1-8004] (court acknowledged that protecting the identity of potential grievants is a justifiable union consideration). Moreover, the degree of specificity required of a union must take into account the fact that, in many cases, including the one now before us, a union will not be aware of the contents of a requested document.

14. In NLRB v. FLRA, the court held that documents "that are strictly 'intramanagement' normally will not be discoverable" under section 7114(b)(4). 952 F.2d at 533 n.6. However, the court set forth two examples of instances where a union could establish that even management guidance, advice, counsel, or training was necessary, within the meaning of the Statute. In particular, the court held that a union may establish such necessity "where the union has a grievable complaint covering the information[]" and/or where "the disputed document creates a grievable action." Id. at 532, 533 (emphasis omitted). The court noted that documents encompassed by the examples would not be "strictly 'intramanagement'. . . ." Id. at 533 n.7. In National Park Service, 48 FLRA at 1165 n.13, the Authority found it unnecessary to address what bases other than the two examples offered by the court might support a

finding that intramanagement guidance documents are necessary.

15. We have examined Long's appraisal, which was attached to the parties' stipulation, in camera. The appraisal consists of evaluations of Long's performance in four job elements. In three of the four elements, separate references, easily identified, are made to Long's performance first as a Group Manager and later as an Incentive Pay Coordinator.

16. In reaching our conclusion, it is unnecessary to determine and accordingly we do not reach the issue whether the appraisal, if admitted into evidence at an arbitration hearing, would prove the allegations in Stevens' grievance. Indeed, it could be found necessary even if, on review, the Charging Parties decided that Steven's grievance lacked merit.

